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101ST CONGRESS
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TREATY WITH CANADA ON MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS

JULY 31 (legislative day, JANUARY 3), 1989.—Ordered to be printed

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Mr. PELL, from the Committee on Foreign Relations, submitted the following

REPORT

together with

ADDITIONAL VIEWS

The Committee on Foreign Relations, to which was referred the Treaty between the Government of the United States of America and the Government of Canada on Mutual Legal Assistance in Criminal Matters, with Annex, signed at Quebec City on March 18, 1985, having considered the same, reports favorably thereon without amendment and recommends that the Senate give its advice and consent to ratification thereof.

BACKGROUND

The negotiation of mutual legal assistance treaties (MLAT's), treaties designed to obtain evidence from abroad, represents a relatively new development in the area of international law enforcement. Negotiations on the first MLAT began over 17 years ago in response to increasing evidence that Swiss banks were being used to launder and hide organized crime money. In 1973, an MLAT between the United States and Switzerland was signed; it entered into force in 1977. In the first 8 years in force, over 300 requests from the United States had been handled by Swiss authorities. The treaty clearly has been and continues to be of assistance to American officials, but an extensive right of appeal available to those affected by American requests and the Swiss refusal to permit information provided by them to be used in tax evasion prosecutions have rendered the treaty less than a perfect instrument.

Since the MLAT with the Swiss entered into force, MLAT's with the Netherlands, Turkey, and Italy have entered into force, as have

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a number of executive agreements in the same vein with the Cayman Islands, the British Virgin Islands, Montserrat, Anguilla, Turks and Caicos, Haiti, Nigeria, and the United Kingdom. Generally speaking, executive agreements have been limited to narcotics cases and have served as the first step toward agreement on a more expansive mutual assistance treaty. In addition, MLAT's have been negotiated with Colombia and Morocco, but each has been ratified by the United States only. At the present time, MLAT's with Canada, Thailand, the Bahamas, the Cayman Islands, Mexico, and Belgium have been signed but not yet ratified by the United States.

The traditional procedure for obtaining evidence from foreign countries is by the cumbersome, time-consuming, and extremely limited process of letters rogatory, a process whereby written requests from the court of one country to the court of another asking the receiving court to provide evidence or some other form of assistance are made. Letters rogatory have been found lacking in that: (1) They fail to have the element of compulsion; (2) they produce evidence which is inadmissible in the requesting country's courts; and (3) the requested nation often lacks sufficient political will or incentive to comply with the other country's request.

MLAT's are a significantly more effective means of obtaining legal assistance. An MLAT obligates each country to provide evidence and other forms of assistance needed in criminal cases. An MLAT, either by itself or in conjunction with domestic implementing legislation, can provide a means of overcoming bank and business secrecy laws that have in the past so often frustrated the effective investigation of large-scale narcotics trafficking operations. In an MLAT, the United States has the opportunity to include procedures that will permit us to obtain evidence in a form that will be admissible in our courts. Such procedures would include the use of certificates needed to admit foreign business records, or the opportunity for adequate direct and cross-examination of witnesses in depositions taken abroad. Finally, MLAT's are designed to streamline and make more effective the process of obtaining evidence. Each treaty provides for a central authority, the Justice Departments of the two countries, which is responsible for making and executing requests under the treaty.

MLAT's should add an element of standardization and uniformity to criminal procedures worldwide. The ability of criminals to hide the evidence and fruits of their crime will be diminished with the enhancement of the capacity of law enforcement agencies to cooperate across national boundaries in the investigation and prosecution of those crimes.

The United States and Canada have a longstanding tradition of cooperation in criminal justice matters. The United States law enforcement community has long known that it could look to Canada for assistance, and that assistance would generally be granted. However, assistance was sometimes prohibited by Canadian law which provided that its courts had authority to order production of documents or examination of witnesses for a foreign country only if the court were satisfied that the evidence produced would be used at trial and that it was not sought solely for the purpose of furthering the investigation. This law thwarted U.S. efforts to investigate

and prosecute certain cases. In those instances, the United States was often forced to resort to serving subpoenas for documents located in Canada on the United States branches of institutions doing business in both countries. Canada viewed these subpoenas as intrusions on its sovereignty but recognized that the United States had no alternative in those cases where Canada was prevented by its law from assisting the United States.

On March 19, 1985, the United States and Canada signed the Treaty on Mutual Legal Assistance in Criminal Matters. This treaty, together with the Canadian implementing legislation, when adopted, will remove the legal barrier and obligate Canada to provide assistance at the investigative stage. Likewise, it will diminish considerably the need for the United States to issue or enforce subpoenas for documents and records located in Canada.

Purpose

The treaty provides for assistance in the "investigation, prosecution and suppression of offences," thereby obligating assistance at the investigative state (such as grand jury proceedings), as well as after formal charges have been filed. An offense within the scope of the treaty, for the United States, is an offense punishable by imprisonment for 1 year or more; for Canada, all serious offenses in the Canadian federal criminal code, or a serious provincial offense (relating to violations of securities, wildlife protection, environmental protection, and consumer protection laws) included in the Annex.

The treaty establishes the principle that assistance is available without regard to "dual criminality."

The kinds of assistance provided for under the treaty include but are not necessarily limited to: taking testimony and statements; obtaining documents, records and evidence; and executing requests for searches and seizures.

Committee Comments

The committee believes that Mutual Legal Assistance Treaties (MLAT's) are a key element in the U.S. strategy to improve international cooperation against crime, particularly narcotics-related offenses such as RICO, CCE, and money laundering. There is no country with which we have more extensive or more productive law enforcement cooperation than with Canada. The MLAT with Canada will facilitate certain forms of legal cooperation, particularly at the preindictment stage, and ease frictions caused by United States subpoenas of documents located in Canadian branches of firms doing business in both countries.

During committee consideration of the treaty with the Government of Canada, as well as the other five pending MLAT's, concern was expressed that the bilateral treaties could in some manner abridge the constitutional rights of U.S. citizens. A reservation was proposed to each of the MLAT's asserting that "nothing in this treaty requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States."

The U.S. Supreme Court, in its own words, "has regularly and uniformly recognized the supremacy of the Constitution over a treaty, "*Reid* v. *Covert*, 354 U.S. 1, (1957). Thus, the committee viewed the proposed reservation as unnecessary. As a matter of domestic law, the Constitution necessarily circumstances the Government's authority to act, and the courts could invalidate any unconstitutional action taken pursuant to the treaties whether or not such reservation were included in the instrument of ratification.

None of the MLAT's requires or authorizes legislation or other action which is prohibited by the Constitution, nor could they properly do so. The reservation thus adds nothing in the way of constitutional protection.

In addition, our treaty partners might well object because it is passed as a reservation with respect to our intended implementation of the treaty and will be expressly included in the instrument of ratification. Each of our treaty partners would have to accept it. Some of the pending six might not, and others with whom the United States wants to negotiate in the future may decline to do so if such a reservation is added at the time of ratification. More likely, some might insist on adding a reciprocal reservation, and that could limit the usefulness of the treaty for our purposes since constitutional limitations have different effects in different legal systems.

The reservation also raises dangerous litigation risks. It could provide a target for defendants as well as the targets of investigations to interpose specious challenges to MLAT requests where they could not now do so. They could also in effect substitute the actions of a foreign government for our own constitutional requirements when they carry out an MLAT request in their own country by permitting defendants to move to exclude evidence produced under an MLAT request because the procedure followed by the foreign government did not comport with those required by the Constitution.

Finally, the reasons why a similar reservation was adopted with regard to the Genocide Convention are inappropriate here. Unlike the Genocide Convention, the MLAT's do not create new grounds for which U.S. citizens can be tried. Instead, they establish mechanisms by which evidence can be obtained overseas in a form admissible in U.S. courts through such means as service of process, taking of testimony, admission of documentary evidence such as bank records, and the execution of requests for searches and seizures.

These are essentially procedural matters, already well regulated by the courts. In roughly a decade's experience under the existing MLAT's, no significant constitutional questions have arisen that would require inclusion of the reservation.

Finally, concern was raised that defendants in criminal cases are explicitly excluded from use of the Mutual Legal Assistance Treaties. The committee notes that nothing in this treaty is intended to negate the authority of the Court to ask the prosecution to make requests for information under the treaty.

COMMITTEE ACTION

100TH CONGRESS

On April 20, 1988, the committee held its first hearing on the six treaties relating to mutual legal assistance in criminal matters with the Cayman Islands, Mexico, Canada, Belgium, the Bahamas, and Thailand. Testimony was heard from administration witnesses, Mary V. Mochary, Principal Deputy Legal Adviser, Department of State, and Mark M. Richard, Deputy Assistant Attorney General, Criminal Division, Department of Justice.

On June 14, 1988 the committee held another hearing at which the following public witnesses presented testimony: Mr. Bruce Zagaris, Attorney Berliner & Maloney, Washington, DC; Mr. Robert L. Pisani, Executive Director, International Legal Defense Counsel, Philadelphia, PA; Mr. Philip White, Attorney, Adam, McCullough & Beard, Washington, DC.

The committee met to consider the Treaty between the Government of the United States of America and the Government of Canada on Mutual Assistance on September 27, 1988. Senator Helms offered a reservation to each of the pending treaties asserting that "nothing in this treaty requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States." The Helms reservation to all the treaties was defeated by a 3 to 15 vote with Senators Helms, Pressler, and Trible voting in the affirmative and Senators Pell, Sarbanes, Cranston, Dodd, Kerry, Simon, Sanford, Adams, Moynihan, Lugar, Kassebaum, Boschwitz, Murkowski, Evans, and McConnell voting in the negative.

The committee voted by voice vote with a quorum present to report favorably the treaty with a resolution of ratification to the Senate for its advice and consent.

101ST CONGRESS

On April 18, 1989, the committee held a hearing on the six treaties relating to mutual legal assistance in criminal matters with the Cayman Islands, Mexico, Canada, Belgium, the Bahamas, and Thailand. Testimony was given by Mary V. Mochary, Principal Deputy Legal Adviser, Department of State, and Edward Dennis, Assistant Attorney General, Criminal Division, Department of Justice.

On May 2, 1989, Commissioner William von Raab of the U.S. Customs Service testified before the committee on the mutual legal assistance treaties and other matters. The complete hearing record on this treaty as well as the other five MLAT's is printed as an appendix to the committee report on the treaty with the Cayman Islands (Treaty Doc. 100–8).

The committee met to consider the Treaty between the Government of the United States of America and the Government of Canada on Mutual Legal Assistance in Criminal Matters, with Annex, on July 25, 1989. Senator Helms offered a reservation to each of the pending treaties stating that "nothing in this treaty requires or authorizes legislation or other action by the United States

of America prohibited by the Constitution of the United States as interpreted by the United States." The Helms reservation to all the treaties was rejected by a vote of 2 to 15 with Senators Helms and Pressler voting in the affirmative and Senators Pell, Biden, Sarbanes, Cranston, Dodd, Kerry, Simon, Sanford, Moynihan, Robb, Lugar, Kassebaum, Boschwitz, McConnell, and Mack voting in the negative.

The committee voted 18 to 1 to report favorably the treaty with a resolution of ratification to the Senate for its advice and consent. Ayes: Senators Pell, Biden, Sarbanes, Cranston, Dodd, Kerry, Simon, Sanford, Moynihan, Robb, Lugar, Kassebaum, Boschwitz, Pressler, Murkowski, McConnell, Humphrey, and Mack. Nays: Senator Helms.

Section-by-Section Analysis

The following technical analysis, which was prepared by the U.S. negotiating team, constitutes the formal executive branch representation as to the meaning of this treaty and the obligations to be assumed by the United States under it:

TREATY BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF CANADA ON MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS

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TECHNICAL ANALYSIS
MUTUAL LEGAL ASSISTANCE TREATY BETWEEN UNITED STATES AND CANADA

INTRODUCTION

The United States and Canada have a longstanding tradition of cooperation in criminal justice matters unique among nations of the world. The United States law enforcement community has long known that it could look to Canada for help and that the Canadians stood ready and willing to provide assistance. But, unfortunately, assistance was sometimes forbidden by Canadian law which provided that its courts had authority to order production of documents or examination of witnesses for a foreign country only if the court were satisfied that the evidence produced would be used at trial and that it was not sought solely for the purpose of furthering the investigation. Generally, that meant that assistance could be granted only after charges were filed and not while the case was before a grand jury or otherwise still at the investigative stage.[1*] This rule thwarted U.S. efforts to investigate and prosecute certain cases. It also meant unequal treatment since the United States provided assistance without regard to whether the case was pre- or post-indictment.[2]

The United States resorted to judicious "self help" to complete investigations when Canadian assistance was not available. A method used with some frequency to obtain documents needed as evidence located in Canadian branches of institutions doing business in both countries was that of serving subpoenas for the documents on the U.S. branches. Canada viewed these "Bank of Nova Scotia" subpoenas, as they came to be known,[3] as intrusions on its sovereignty but, recognized that the United States would continue to use them in those cases where Canada was prevented by its law from assisting the United States.

On March 19, 1985, the United States and Canada signed the Treaty on Mutual Legal Assistance in Criminal Matters. When

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* All notes follow text.

ratified, that Treaty, together with the Canadian implementing legislation when adopted,[4] will remove the legal barrier and permit (indeed, obligate) Canada to provide assistance prior to indictment. By making assistance available at the investigative stage, it diminishes considerably the need for the United States to issue or enforce Bank of Nova Scotia subpoenas for documents and records located in Canada. It also makes available international cooperative procedures and powers which our experience has shown to be the most desirable and effective.

The following technical analysis of the Treaty, similar to treaties currently in force with Switzerland, Turkey, the Netherlands, and Italy[5] and to treaties signed, but not yet ratified, with Belgium, Mexico, Thailand, the United Kingdom on behalf of the Cayman Islands, Belgium, and the Bahamas,[6] was prepared by the U.S. delegation to the treaty negotiations and reviewed by the Canadian delegation.

TECHNICAL ANALYSIS OF THE TREATY

Article I -- Definitions

Central Authority

The Attorney General of the United States and the Minister of Justice of Canada are the Central Authorities for the Treaty.[7] Their powers and duties are set forth in Articles III [other assistance], V [limitations on compliance], VI [requests], VII [execution of requests], IX [limitations of use], XI [service of documents], and XVII [proceeds of crime]. Those provisions permit them to exercise control over the making of requests, determining whether the requests meet the requirements of the Treaty, and making decisions about providing assistance when the Treaty makes such decision discretionary. The Treaty specifically contemplates that the Central Authorities will remain in close and direct contact with regard to the implementation of the Treaty and the processing of individual cases.

Competent Authority

The Treaty defines "Competent Authority" to mean "any law enforcement authority with responsibility for matters related to the investigation or prosecution of offences" and is broad enough to include authorities of states, provinces, territories, federal districts, and municipalities. Competent Authorities are permitted or required, as the case may be, to request assistance (Article VI) and to execute requests (Articles VII, X, and XVI). Law enforcement authority as used in this definition is strictly limited to persons and agencies with investigative or prosecutorial functions.[8]

"Offence"[9]

The definition of "offence" reflects technical differences between the U.S. and Canadian penal law. Having agreed that assistance under the Treaty should be mandatory only when the offense involved is serious, each delegation took responsibility for drafting its own definition. For the United States it is an offense punishable by imprisonment for one year or more. The definition includes felonies and misdemeanors but excludes petty

offenses (as those terms are used in the federal system).[10] The delegations agreed that while this definition refers to a punishment of imprisonment, Treaty assistance will be granted in situations involving corporations where no term of imprisonment is possible, so long as imprisonment could be imposed if the crime were committed by a natural person. The definition also permitted the U.S. to specify offenses in the Annex to the Treaty for which assistance would be mandatory even though they did not come within the terms of the definition; however, the U.S. found it unnecessary to specify any such offenses because the definition is broad enough to cover all serious federal and state offenses.

The Canadian definition of "offence" proved somewhat more difficult to draft. Each definition attempted by the Canadian delegation either fell short of the goal of including all offenses subject to punishment of imprisonment for a year or was over-inclusive. Ultimately the negotiators agreed on a relatively short definition sufficient to include all serious offenses in the Canadian federal criminal code ("an offence created by a Law of Parliament that may be prosecuted upon indictment"); the serious provincial offenses (relating to violations of securities, wildlife protection, environmental protection, and consumer protection laws) were included in the Annex.

Public Interest

"Public Interest," defined as any "substantial interest related to national security or other essential public policy," is significant in light of Article V which permits the Requested State to refuse assistance when the Central Authority finds that its execution would be contrary to its "public interest." It is intended to be flexible enough to permit the parties to protect basic national interests while assuring that assistance will be granted in most cases. See the analysis of Article V, below, for further discussion.

Article II -- Scope of Application

The first paragraph of this Article establishes the basic obligation of the parties to provide assistance in "all matters relating to the investigation, prosecution and suppression of offences." This language, which was intended to be as broad as possible, includes the obligation to provide assistance regardless of whether the case is still being investigated or has already been indicted. It also includes assistance for proceedings technically of a civil or administrative nature which are related to criminal prosecutions, such as forfeiture proceedings and proceedings to collect fines.

The second paragraph lists types of assistance the negotiators specifically intended to make available under the Treaty. The list is not exclusive, and the negotiators agreed that other types of assistance not contrary to the provisions of the Treaty or specifically prohibited by domestic law may be granted under the Treaty.

The third paragraph establishes the principle that assistance is available without regard to "dual criminality," i.e., whether the acts being investigated or forming the gravamen of the prosecution would have been illegal in the Requested State.[11] By avoiding a dual criminality provision in this Treaty, the United States expects to receive assistance for such important crimes as, for instance, money laundering, even though Canada has yet to enact similar legislation.[12]

Paragraph 4 is an express recognition that the Treaty is a law enforcement tool for use by the two governments and not a discovery tool for private parties. This reflects the consensus of the negotiators that neither State Party wished to obligate itself to expend resources in aid of defendants, persons working on their behalf, or other private parties.[13] The paragraph also states that the Treaty does not create a right for a defendant or other interested private party to obtain evidence, nor a basis for such a person to argue for the suppression or exclusion of any evidence; nor does it create a basis upon which such a person could attempt to frustrate the execution of a request.[14]

Article III -- Other Assistance

The first paragraph of this Article provides that the Parties, including their competent authorities, may provide assistance pursuant to other agreements, arrangements, or practices. This is to ensure that existing and future working arrangements among federal, provincial, state, and municipal authorities are not preempted or affected in any manner by this Treaty. The phrase "including their competent authorities" was intended to underscore that "agreements, arrangements, or practices" include those made at the working level.

It is recognized that some prosecutions of petty offenses are of such significance that assistance should be granted notwithstanding the definition of an offense in Article I. Thus, the second paragraph of this Article grants discretionary authority to the Central Authorities to agree to provide assistance in such cases as they may find appropriate.

Article IV -- Obligation to Request Assistance

The first paragraph provides that a Party needing documents, records, or articles located in the territory of the other and not available under any cooperative agreement or arrangement must use the Treaty to obtain them. The United States agreed to this "first resort" provision because the scope of the Treaty is broad enough to cover the vast majority of situations requiring the production of documents and records located in Canada and because the United States is convinced that the Treaty mechanism will provide the evidence in a timely manner. The Canadian delegation considered this a matter of great importance, as suggested in the introduction hereto, in order to regularize transborder evidence gathering activities and to reduce the United States' enforcement of the so-called "Bank of Nova Scotia subpoenas."[15] The Canadian delegation agreed, however, that mere service of such a subpoena would not be considered a violation of the Treaty as long as no attempt were made to enforce it until after the consultative process required by the second and third paragraphs had taken place.[16]

The last two paragraphs establish a consultative process for dealing with cases in which an investigation or prosecution is jeopardized by a refusal to grant assistance for a request under paragraph (1) or by a delay in its execution. The Central

Authority of the Requesting State initiates the process by contacting the other Central Authority. It would normally do so after a request is made, but it could be done prior thereto when the experience of the parties establishes that a request would be denied or overly delayed. The purpose of the consultations is to provide the Requested State with all the necessary facts and allow it a reasonable length of time to determine whether there is another avenue available by which the needed items could be provided promptly.

The consultation requirement of the Treaty is completed and the obligations of the Requesting State are fulfilled, thus freeing it to use its own resources to obtain the needed items, thirty days after the consultations are initiated, unless the Central Authorities otherwise agree. The time runs from the day the Central Authority of the Requesting State first contacts the other Central Authority to initiate consultations.

Article V -- Limitations on Compliance

The first paragraph of this Article establishes that there are only two bases upon which the Requested State may refuse to grant assistance: (1) the request was not made in conformity with the Treaty; or (2) execution of the request is contrary to public interest (as defined in Article I).

While the first of the two bases for refusing assistance is self-evident -- that there is no obligation to assist when the Requesting State has not properly invoked the Treaty, the clause establishes that refusal of assistance in such a case is discretionary. The clause thus serves the dual purpose of reminding the Requesting State to follow the Treaty while expressly granting the Requested State authority to waive defects.

The other basis for denying a request is that its "execution is contrary to its public interest, as determined by its Central Authority." As noted above, Article I defines "public interest" as "any substantial interest related to national security or other essential public policy." The provision is flexible enough that neither party should find itself obligated to grant assistance in cases where doing so would seriously damage its basic institutions, violate its notions of fundamental justice and fair play, or threaten its security, but restrictive enough

that a request should not be refused for inconsequential reasons. Examples of the kinds of cases the negotiators had in mind which would permit refusal of assistance include requests requiring disclosure of important military secrets or requests for assistance in a prosecution offensive to basic principles of society (e.g., if Canada were to prosecute a person for practicing his religion -- which, of course, it cannot do under its law -- the United States could refuse assistance). Specific note is made that the U.S. expects to give and receive assistance in most cases involving pure political offenses (e.g., espionage, sabotage, treason) and related offenses.[17] Similarly, assistance is not excluded solely because the offense in question is a purely military, tax, or antitrust offense.[18] The negotiators considered and rejected the possibility of requiring exact reciprocity such that if one State were to refuse assistance in a particular type or class of cases, so would the other.

The discretionary authority to grant or deny assistance was given to the executive rather than to the judiciary primarily because not all forms of assistance involve the courts.[19] It is noted that the court has inherent authority to satisfy itself that the Central Authority made its decision after fully considering all relevant issues. The court may not, however, substitute its discretion for that of the Central Authority under this language.[20]

The second paragraph allows the Requested State to postpone (but not deny) assistance in order to avoid interference with an investigation or prosecution in the Requested State.

The third paragraph provides that before the Requested State either denies or postpones a request, it must consult with the Requesting State to see if a satisfactory arrangement can be devised to permit immediate assistance. The fourth paragraph requires that any agreement reached in these consultations conducted through the Central Authorities must be respected.

Article VI -- Requests

The first paragraph of Article VI provides that requests shall be made by the Central Authority of the Requesting State directly to the Central Authority of the Requested State. While the negotiators agreed that it was not desirable to limit or control the informal and direct contact between competent

authorities on most matters, when the obligations of the Treaty are invoked, as in the case where compulsory process is needed, the Central Authorities must play a pivotal role.

The second paragraph provides the general rule that requests shall be in writing in all cases contemplating the use of compulsory process and in such other cases as the Central Authority of the Requested State may determine on a case-by-case basis. Recognizing that in urgent situations it might be impossible for the paper work to reach the other Central Authority quickly enough for the purpose of the request to be accomplished, the negotiators agreed to permit such urgent requests to be made orally. In such cases, the Central Authority of the Requesting State must provide a written confirmation as soon thereafter as reasonably possible.

The next paragraph obligates the Requesting State to provide as much information as the Requested State reasonably requires in order to execute the request and lists five elements which should normally be provided on a routine basis.

The fourth paragraph provides that the courts of the Requesting State shall have authority to order the release of the information the Requested State needs in order to execute the request. This paragraph, directed primarily at U.S. grand jury secrecy rules, authorizes U.S. courts to grant orders under Rule 6(e), Federal Rules of Criminal Procedure, permitting disclosure of grand jury information to Canada as necessary in order to obtain assistance. The negotiators also agreed that a court may condition the disclosure of the information on the Requesting State's agreement to maintain the confidentiality of the disclosed information to the extent reasonably necessary and possible.

The last paragraph establishes a general rule that the Requested State will use its "best efforts" to keep a request and its contents confidential except when permitted to disclose that information by the Requesting State.[21]

Article VII -- Execution of Requests

The first paragraph of the Article obligates the Central Authority of the Requested State promptly to execute the request itself or send it to the appropriate competent authority for

expeditious execution. U.S. federal agents, attorneys, and courts will normally execute Canadian requests. State and local authorities, nevertheless, are also bound to assist when necessary (for instance, when records of convictions from local courts are requested).

The paragraph also provides that the courts of the Requested State shall have jurisdiction to issue necessary process (subpoenas, search warrants, or other orders) to give effect to the request. This provision serves several different purposes. First, it obligates Canada to enact necessary implementing legislation.[22] Second, it authorizes state and local courts in the U.S., to the extent that they are called upon to execute a request, to issue necessary process. Third, it provides slightly broader authority than 28 U.S.C. 1782 for U.S. federal courts to use their power to issue subpoenas and other process when Canada needs evidence for use before an administrative agency, as might be the case in connection with a Canadian forfeiture proceeding under Article XVII of the Treaty.[23]

Article VII(2) provides that the Requested State is to execute the request pursuant to its own laws, practices, and procedures, except that "directions stated in the request" will be honored unless prohibited by domestic law. For instance, if the Requesting State asks that a deposition be video taped, the Requested State should do so unless its law prohibits video taping such proceedings. The "directions stated in the request" will also include such important but somewhat more routine matters as requests for notice to the Requesting State of the time when the request will be executed and requests that certain necessary persons (i.e., the accused, defense counsel, or case agent) be allowed to be present when the evidence is taken.

Article VIII -- Costs

This Article reflects a careful balancing of three factors. First, the Requested State should normally assume the cost of gathering evidence within its own boundaries. Second, the Requesting State should normally bear the costs of bringing witnesses to the Requesting State. Third, where execution of a request will be substantially more costly than reasonably expected, the parties must consult to determine whether the

request merits the expenses and, if so, how to minimize and allocate them.

Further, the last paragraph reflects an undertaking of the Parties to agree on practical measures for the reporting and payment of costs. The Central Authorities intend to exchange letters prior to the Treaty's entry into force establishing clear channels and procedures for "billing" and "collecting" payment of costs.

Article IX -- Limitations of Use

The first paragraph of Article IX provides that the Requested State may impose limitations on the use by the Requesting State of information or evidence obtained under the Treaty. Before doing so, however, the Requested State must engage the other State in consultations. The purpose of the consultations is to discuss the necessity for and scope of the limitations and the ability of the Requesting State to comply with the limitations.

In contrast to Article V(4), there is no absolute obligation for the Requesting State to comply with conditions imposed under this paragraph. Under Article V the Requested State has a right to postpone assistance or refuse it altogether such that granting assistance subject to conditions is done as a matter of grace. In that case, the Requesting State must comply or forego the assistance. This paragraph deals with the situation in which the Requesting State has a right to demand compliance, but the Requested State wishes to keep the information confidential or allow it to be used only in a certain manner. The negotiators agreed that in this situation it would be illogical for the Requesting State to be bound absolutely to comply with the conditions; they agreed, nevertheless, that the Requesting State has a moral obligation to comply to the extent reasonably possible.[24]

The second paragraph imposes an obligation on the Requesting State to disclose or use the information or evidence it obtains only for the purposes stated in its request unless the Requested State grants permission for such other use or disclosure.

The last paragraph provides that once the information or evidence becomes public in the Requesting State, that State is

free to use it for any purpose. In discussing this provision, the negotiators considered the possibility of including language making clear that the information or evidence should be made public only as permitted by the Treaty. The negotiators ultimately agreed that such language was unnecessary since both parties are expected to deal in good faith.

A chief concern in the negotiation of this Article was whether the Requesting State would be able to protect the identity of informants when the Requested State believed it necessary for security reasons. After exchanging assurances that methods were available under each Party's laws permitting the authorities to protect the identity of informants, an understanding was reached that special care would be taken to ensure the confidentiality of that information to the extent required by the Requested State.

Article X -- Location or Identity of Persons

Under this Article, commonly found in mutual legal assistance treaties, the parties agree to use best efforts to locate or determine the identity of persons specified in the request.

Article XI -- Service of Documents

The first two paragraphs are commonly found in mutual legal assistance treaties. The first provides that the Requested State agrees to serve documents at the request of the other State. The second provides that when the Requesting State wishes to have a document served requiring a response or appearance in the Requesting State, it must transmit the document to the Requested State early enough so that the person served will have a reasonable opportunity to comply.

The third paragraph of this Article relates to an issue which was the subject of a great deal of discussion during the negotiations, namely, whether a person voluntarily travelling from the Requested State to the Requesting State to appear as a witness should be granted "safe conduct" (i.e., assurance that he would not be subject to arrest on account of any acts which preceded his departure from the Requested State). On one hand,

there was the concern that the Requested State would not wish to encourage witnesses to travel to the Requesting State if safe conduct were not guaranteed; on the other hand, it was recognized that the Requesting State would want to avoid being surprised by finding that persons wanted for serious offenses were entering its territory routinely under the protection of the Treaty.

Paragraph 3 of Article XI represents a compromise among these competing interests. It provides that the Requesting State must make a reasonable effort to include in its request for service of such process information concerning outstanding warrants or other process in criminal matters pertaining to the person served. Assuming no such process is outstanding, the person would be so advised; however, the officer serving the document would not be under an obligation to encourage the person to go to the other State. Indeed, the serving officer might go so far as to advise the person that the possibility exists of process being outstanding, the existence of which the Central Authority providing the information was unaware.[25]

The fourth paragraph of the Article provides that the Requested State shall return proof of service in any manner agreed upon in Article XVIII of the Treaty. The reference to Article XVIII is intended to provide the parties flexibility to change the form and contents of the return in keeping with changes in domestic law.

Article XII -- Taking of Evidence in the Requested State

The first paragraph of this Article obligates the Requested State to use court process, if necessary, to compel persons to appear and testify and produce documents at the request of the Requesting State. In drafting this provision, the negotiators originally considered using the word "shall" in order to underscore the obligatory nature of the Article. Because the mandatory "shall" failed to take into account the witnesses who appear voluntarily, thus making court process unnecessary, this formulation using "may" was agreed to, with the understanding that the Requested State is obligated to use mandatory process when necessary to execute the request.

Current U.S. law already provides that a court may issue a subpoena for a witness to appear, testify, and produce documents in execution of a foreign request for assistance in the

investigation of a case. 28 U.S.C. 1782. Canadian law does not. Present Canadian procedure requires the use of a search warrant in order for physical or documentary evidence to be obtained during the course of an investigation.[26] The Canadian delegation gave express assurances to the U.S. delegation that its implementing legislation would address this point, allowing for courts to issue process in the nature of a subpoena duces tecum when necessary to execute a request.[27]

The reference in the first paragraph to execution of the request "in accordance with the requirements of the law of the Requested State" takes into account testimonial privileges and immunities as well as procedure. The parties agreed that questions concerning the applicability of privileges provided by the law of the Requesting State would be preserved for consideration by the courts of that State.[28]

The second paragraph provides that a person appearing as a witness or producing documents pursuant to this Article is entitled to the same fees and allowances as the Requested State normally would provide if the appearance were for a purely domestic purpose.

Article XIII -- Government Documents and Records

This Article serves the purpose of assuring that records and documents in the possession of one Party are made available to the other for criminal justice purposes. Examples of the types of government documents and records covered by this provision are court records (including records of convictions), police records, immigration records, articles of incorporation, and birth and death records. Given the various types of records to be exchanged under this provision, the negotiators agreed that "government" means all levels of government, including federal, state, provincial, territorial, and municipal.

The first paragraph obligates the Requested State to produce copies of publicly available documents and records upon demand. The second paragraph obligates the Requested State to provide copies of documents, records, or information not publicly available "to the same extent and under the same conditions as [they] would be available" to domestic law enforcement and judicial authorities.

In discussing this Article, the U.S. delegation explained the significance of 26 U.S.C. 6103(k)(4), indicating that if the negotiators agreed that this was intended to be a vehicle by which tax information could be provided, then the U.S. could give Canada assistance when it needed information in the possession of the IRS which otherwise could not be furnished. The Canadian delegation responded that the assistance it intended to grant did include tax information,[29] noting, however, that implementing legislation would be required on the Canadian side. The U.S. delegation was, therefore, satisfied that these understandings and agreements make this Treaty a "convention" within the meaning of 26 U.S.C. 6103(k)(4).

Article XIV -- Certification and Authentication

This Article, together with the provisions of Article VII(2) requiring that the Requested State execute requests in accordance with the directions contained in the request, Article XI relating to the return of service, and Article XVIII permitting the parties to agree on specific measures to facilitate the implementation of the Treaty, are of critical importance. Together they ensure that the Requested State will certify or authenticate documents and records provided under the Treaty in a manner designed to establish a proper foundation for admission into evidence.

The first paragraph of this Article permits the needed certification or authentication to be specified in the request or to be agreed upon in advance pursuant to Article XVIII. By way of example, the United States intends to reach agreement with Canada under Article XVIII that it will certify "records of a regularly conducted activity," as defined by 18 U.S.C. 3505, pursuant to a "3505" form supplied by the United States.[30] The "3505" form and others the United States intends to begin using immediately are contained in the appendix to this analysis. Other situations where the certification/authentication procedure is not so well defined will be handled on a case-by-case basis.

During the negotiations, careful thought was given to the feasibility of appending standard certification forms to the Treaty, as has been done in other mutual legal assistance treaties. For instance, our Mutual Legal Assistance Treaty with Thailand[31] provides forms to certify business records (Article

8(5)), records of a government office or agency (Article 9(3)), and articles seized pursuant to a search and seizure (Article 11(2)). Ultimately, the negotiators agreed not to include such forms in favor of making the Treaty as flexible as possible.

The second paragraph of Article XIV provides that a document or record certified or authenticated pursuant to the first paragraph and which is otherwise admissible shall require no further certification or authentication. The purpose of this paragraph is two-fold. First, it is intended to indicate that the courts retain full authority to rule on the admissibility of the proffered evidence with regard to materiality, relevance, etc.; second, it is intended as a direction to the courts that, if the documents or records have been certified and authenticated pursuant to paragraph of this Article and are otherwise admissible, the courts should not exclude the evidence because of a technical defect in the certification or authentication.

In this connection, the types of certifications and authentications the United States intends to request of Canada in order to provide a foundation for evidence obtained under the Treaty include those:

1. Established or permitted by the Federal Rules of Evidence or by a statute such as 18 U.S.C. 3505;[32]

2. Contained in or appended to other mutual legal assistance treaties ratified by the United States in a similar manner and for the same purpose as provided in those treaties;[33] or

3. Available under other treaties and multilateral conventions currently in force or which may enter into force relating to certification, authentication, or legalization of documents.[34]

Implementing legislation is unnecessary inasmuch as it is intended that established procedure will be followed for offering and determining admissibility of evidence so certified or authenticated. See, e.g., 18. U.S.C. 3505 and Rules 804(b)(5) and 9[illegible] of the Federal Rules of Evidence.

Article XV -- Transfer of Persons in Custody

This Article deals with the relatively common situation in which a person incarcerated in one country is needed as a witness in the other. On some occasions it has been possible for ad hoc arrangements to be made to permit the person to be escorted to the other country, testify at the trial or other proceeding, and then return to the Requested State.[35] This Article, which is commonly found in our mutual legal assistance treaties,[36] establishes the procedures for this to occur on a routine basis.

This Article applies to a "person in custody." The phrase is intended to mean a person in the custody of an authority at any level of government (federal, state, local, etc.). Transfer requires the consent of the person in custody as well as the consent of the Requested State. The Requesting State is expected to keep the person in custody and return him to the Requested State as soon as possible.

The requirement in paragraph two that the person transferred be returned "immediately after the execution of the request" means that the person cannot be arrested, detained, or subjected to criminal process[37] for acts which predated his arrival in the Requesting State. Extradition procedures are not required in order to assure the return of the person transferred pursuant to this paragraph.

The negotiators discussed the situation where the Requested State's basis for detention expires while the person is in the Requesting State. It was agreed that, in such cases, the Central Authorities had sufficient authority under Article XVIII to agree to release him while he was still in the Requesting State and to relieve the Requesting State of the necessity for returning him to the Requested State.[38]

Article XVI -- Search and Seizure

This Article obligates each Party to conduct searches and seizures at the request of and for the benefit of the other. The requirement in paragraph 1 that the search and seizure be executed "in accordance with the requirements of

the law of the Requested State" is understood to include constitutional requirements.[39]

The second and third paragraphs of the Article are designed to permit the Requesting State to seek the admission into evidence of items seized based on certifications provided by the competent authority in the Requested State, thus avoiding the need to take depositions or produce live witnesses to establish the chain of custody. The negotiators considered the possibility of appending a form "chain of custody" certification to this Treaty but decided against it for the reasons explained in the discussion of Article XIV. The intent is to give each party maximum flexibility to devise (and revise as experience may dictate) instructions to be followed by the Requested State in completing the certifications. The United States intends to urge the admission of these certificates into evidence under Rule 803(24) of the Federal Rules of Evidence.

The last paragraph grants the Requested State authority to fashion appropriate conditions prior to transferring seized items to the Requesting State in order to ensure that the interests of a third party in that property are protected.

Article XVII -- Proceeds of Crime

This Article deals with forfeiture, restitution, and collection of fines. The subject of protracted discussions during the negotiation of the Treaty, it reflects the intent of both parties to provide as much assistance as their respective laws allow in this rapidly developing area of the law.

The Article obligates each Central Authority to notify the other of proceeds of crime[40] believed to be located in the territory of the other Party and for each to assist the other to the extent permitted by their respective law with regard to forfeiture, restitution, and collection of fines.

The obligation to assist includes <u>all</u> types of assistance. It was specifically agreed, however, that neither party is obligated to: (1) transfer forfeited property to the other State; (2) transfer property to the

other Party where forfeiture proceedings would be instituted; or (3) institute and prosecute claims on behalf of the other for forfeiture or the collection of fines or restitution on behalf of the victims.

Developments in the law since the Treaty was signed show the wisdom of leaving the Article as open-ended as possible in order to allow both Parties to "grow" into it. For instance, since this Treaty was negotiated, the United States has enacted legislation, the Anti-Drug Abuse Act of 1986[1] (hereinafter, "the Act"), expanding the authority of the United States to seize and forfeit property:

> which represents the proceeds of an offence against a foreign nation involving the manufacture, importation, sale, or distribution of a Controlled Substance (as such term is defined for the purposes of the Controlled Substances Act) within whose jurisdiction such offence or activity would be punishable by death or imprisonment for a term exceeding one year and which would be punishable by imprisonment for a term exceeding one year if such act or activity had occurred within the jurisdiction of the United States. [18 U.S.C. 981(a)(1)(B).]

The Act also permits the U.S. to transfer an equitable share of certain forfeited property to other countries. Under regulations promulgated by the Attorney General, this equitable share will generally reflect the direct or indirect contribution of the foreign government in law enforcement activity which led to the seizure and forfeiture of the property. The Act requires that these provisions operate only "to the extent provided for by Treaty" and pursuant to "treaties providing for the transfer of forfeited properties to the foreign country." 18 U.S.C. 981(a)(1)(b) (1986). As noted above, Article XVII does not <u>obligate</u> either party to transfer forfeited properties, but does <u>permit</u> such transfer (or, at least, the proceeds of the sale of such assets, or an equitable portion thereof). Thus, the Executive Branch takes the position that this Article is sufficient to permit the equitable sharing of forfeited assets pursuant to 18 U.S.C. 981.

Another type of assistance for which domestic law continues to evolve relates to the collection of fines imposed in the foreign jurisdiction as a penalty in criminal proceedings. The Canadian delegation indicated that it intended to include a

provision in the Canadian implementing legislation to permit the United States to prosecute an action against assets in Canada to collect such a fine, and the United States indicated an intention to reciprocate, if possible.

The Canadian legislation now pending before Parliament provides in Section 9:

> (1) Where the Minister [of Justice] approves a request of a foreign state to enforce the payment of a fine imposed by a court of criminal jurisdiction of the foreign state, a court in Canada has jurisdiction to enforce the payment of the fine and the fine is recoverable in civil proceedings instituted by the foreign state, as if the fine had been imposed by a court in Canada.
>
> (2) No proceedings under subsection (1) shall be instituted more than five years after the fine was imposed.

The scheme established by this legislation is straightforward: when assets of a person sentenced to pay a fine by a court of the United States are located in Canada, the United States will make an application to Canada under the Treaty for authorization to enforce the criminal fine against the Canadian assets. If the Ministry approves, it will grant authorization permitting the United States to file an action to collect the fine pursuant to Canadian law and procedure.

It is intended that the United States will reciprocate, thus allowing Canada to collect its fines through enforcement action against assets located in the United States.

The general rule of international law is that one country will not enforce the penal judgments of another.[42] The general rule may be modified by treaty, however. The court in Rosado v. Civiletti, 621 F.2d 1179 (2nd Cir. 1980), had occasion to discuss this rule in the context of the Prisoner Transfer Treaty between the United States and Mexico.[43] Judge Kaufman, speaking for the court, noted:

> In dictum too old to question, Chief Justice Marshall declared that '(t)he courts of no country execute the penal laws of another.' The Antelope, 23 U.S. (10 Wheat.) 66, 123, 6 L.Ed. 408 (1825). . .

> Though no nation may unilaterally bind another sovereign by the sheer force of its statutory enactments, nothing in the doctrine enunciated by Marshall precludes a sovereign power from extending recognition to another's penal laws where it chooses to do so. Nor does Marshall's dictum suggest any principle limiting the power of sovereign nations to enter into mutual compacts or treaties obligating the signatories to honor and enforce the penal decrees of one another. In the United States, the constitutionality of such measures was decided long ago when the Supreme Court upheld an extradition agreement with foreign nations as a valid exercise of the treaty-making power. See Terlinden v. Ames, 184 U.S. 270, 289, 22 S.Ct. 484, 491, 46 L.Ed. 534 (1902). See also Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 569-70, 10 L.Ed. 579 (1840). Even where the treaty fails to secure to those who are extradited to another country the same constitutional safeguards they would enjoy in an American criminal trial, it does not run afoul of the Constitution. . . . Moreover, criminal convictions imposed by foreign tribunals have served as predicates for enhanced sentencing under state multi-offender statutes. See, e. g., United States ex rel. Dennis v. Murphy, 265 F.2d 57 (2d Cir. 1959); United States ex rel. Foreman v. Fay, 184 F.Supp. 535 (S.D.N.Y. 1960). [Emphasis added.]

It is intended that the method for implementing this provision in the Treaty will be for the Central Authority of the United States to review the Canadian request and, if it finds it to be an appropriate case for enforcement, to issue an appropriately worded certificate under the Great Seal of the Department of Justice which the Canadian representative may present to the court upon the filing of a civil action for recognition and enforcement of Canada's claim.

Article XVIII -- Improvement of Assistance

This Article, discussed above in connection with Articles XI, XIV, and XV, is otherwise self-explanatory.

Article XIX -- Ratification and Entry into Force
and
Article XX -- Termination

These last two articles contain standard language concerning ratification, the exchange of instruments of ratification, entry into force, and termination of the Treaty.

APPENDIX

CERTIFICATE OF AUTHENTICITY OF BUSINESS RECORDS [44]

I the undersigned: _____,
understanding that I am subject to criminal penalty under the law of Canada for an intentionally false declaration, declare that I am employed by/associated with: _____
_____ in the position of: _____
and by reason of my position am authorized and qualified to make this declaration.

I further declare that the documents attached hereto are originals or true copies of records which:

1. were made, at or near the time of the occurrence of the matters set forth therein, by (or from information transmitted by) a person with knowledge of those matters;
2. were kept in the course of a regularly conducted business activity;
3. were made by the said business activity as a regular practice; and,
4. if not original records, are duplicates of original records.

The originals or duplicates of these records are maintained in the country of: _____.

Date of execution: _____

Place of execution: _____

_____
[signature]

ATTESTATION OF AUTHENTICITY OF FOREIGN PUBLIC DOCUMENTS [45]

I, [Name], attest on penalty of criminal punishment for false statement or attestation that my position with the Government of Canada is [Official Title] and that in that position I am authorized by the law of Canada to attest that the documents attached and described below are true and accurate copies of original official records which are recorded or filed in [Name of Office or Agency], which is a government office or agency of Canada.

Description of Documents:

[Signature]

[Title]

[Date]

ATTESTATION WITH RESPECT TO SEIZED ARTICLES[46]

I, the undersigned, [Name and Title or Position], attest on penalty of criminal punishment for false statements or attestation that I:

-- seized the articles listed below from [person] on [date] at [place] *

-- received custody of the articles listed below from [person] on [date] at [place] *

Description of articles:

I declare that I relinquished custody of those articles on [date] at [place] to: [Name(s) Title or Position].

I declare that, while they were in my custody, these articles were:

-- in no way altered. *

-- altered in the following manner: *

DONE this _____ day of _____, ____, at [place].

[signature]

* cross out the inapplicable statements

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1. Section 43, Canada Evidence Act, requires that the matter for which a foreign state requests assistance must be pending before a court in the foreign state. It has been held to preclude assistance to the United States when the case was still before a grand jury. Re United States of America and Executive Securities Corporation (1977) 77 D.L.R. (3d) 157 (O.H.C.) (relying on Re Raychem Corp. v. Canusa Coating Systems, Inc. (1971) 14 D.L.R. (3d) 684 (Ont.C.A.) and Re Radio Corp. of America v. Rauland Corp. (1956 5 D.L.R. (2d) 424 (O.H.C.), both civil cases); but, see, Zinger, Wuest and Reiser and The Queen, (1981) 2 SCR 392 (allowing execution of letters rogatory from Switzerland at a pre-trial stage when the investigation in Switzerland was undertaken pursuant to a treaty request from Canada), and Re International Association of Machinists and Aerospace Workers et al. and Qantas Airways Ltd. et al, 42 O.R.(2d) 387 (1983) indicating that letters rogatory may be executed at a pre-trial stage if the court is convinced that it is for the purpose of obtaining evidence for use at trial and not for the purpose of discovery or further investigation of the matter.

2. Assistance is available for a foreign country under 28 U.S.C. 1782 without regard to whether the action has already been filed.

3. In Re Grand Jury Proceedings (Bank of Nova Scotia), 740 F.2d 817 (11th Cir. 1984); In Re Grand Jury Proceedings (Bank of Nova Scotia), 691 F.2d 1384 (11th Cir. 1983).

4. Bill C-58, Second Session, Thirty-third Parliament, 35-36 Elizabeth II, 1986-87, First Reading, May 13, 1987 (hereinafter, "Canadian implementing legislation").

5. Treaty Between the United States and the Swiss Confederation on Mutual Assistance in Criminal Matters, May 25, 1971, 27 UST 2019, TIAS 8302 (entered into force January 23, 1977); Treaty between the United States and the Republic of Turkey on Extradition and Mutual Assistance in Criminal Matters, June 7, 1979, 32 UST 311, TIAS 9891 (entered into force January 1, 1981); Treaty between the United States and the Kingdom of the Netherlands, together with a Related Exchange of Notes, June 12, 1981, TIAS 10734 (entered into force September 15, 1983); Treaty between the United States and the Italian Republic on Mutual Assistance in Criminal matters, together with a Related Memorandum of Understanding, November 9, 1982, TIAS ____ (entered into force November 13, 1985).

6. Treaty between the United States and the Kingdom of Belgium, January 28, 1988; Treaty between the United States and the United Mexican States on Cooperation for Mutual Legal Assistance, December 9, 1987; Treaty between the United States and the Kingdom of Thailand on Mutual Assistance in Criminal Matters, March 19, 1986; Treaty between the United States and the United Kingdom of Great Britain and Northern Ireland Concerning the Cayman Islands on Mutual Assistance in Criminal Matters, July 3, 1986; Treaty between the United States and the Kingdom of Belgium on Mutual Legal Assistance in Criminal Matters, January 28, 1988; Treaty between the United States and the Bahamas on Mutual Assistance in Criminal Matters, June 12, 1987, and August 18, 1987.

7. By published regulations, the Attorney General has delegated his authority under such treaties to the Assistant Attorney General for the Criminal Division, who, in turn, has redelegated the authority to the

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Deputy Assistant Attorneys General, Criminal Division, and the Director of the Office of International Affairs. 28 C.F.R. 0.64-1 and Directive No. 81 (44 FR 18661, March 29, 1979, as amended at 45 FR 6541, Jan. 29, 1980; 48 FR 54595, December 6, 1983).

8. It was agreed that there is no objection to the Requesting State's sharing evidence provided by the Requested State with a legislative commission (such as a Royal Commission of Enquiry) or a Congressional Committee in the Requesting State as permitted by and pursuant to the terms of Article IX of the treaty ("Limitations on Use").

9. At the request of the Canadian delegation, the Canadian spelling of "offence" was used.

10. See, 18 U.S.C. 1.

11. Dual criminality is a principle often found in extradition treaties generally prohibiting extradition if the conduct forming the gravamen of the offense in the Requesting State would not have been illegal if performed within the jurisdiction of the Requested State. For a discussion of this principle, see Collins v. Loisel, 259 US 309, 312 (1922). See also Cucuzzella v. Keilikos, 638 F.2d 105, 108 (9th Cir. 1981).

12. The Canadian Embassy has advised the United States that Canada is working on such legislation at this time.

13. This provision may be unnecessary inasmuch as the Central Authority of the Requested State has the ability under Article V(1)(b) to refuse such requests as contrary to the public interest of the State. Nevertheless, including this provision in the treaty was desirable in that it (1) constitutes a directive to the Requesting State not to make such requests and (2) reduces the number of instances in which the Requested State will find it necessary to invoke its authority to refuse a request as being contrary to the public interest, preserving that provision's use for cases more clearly involving matters of national security, or essential public policy.

14. This clause reflects the desire of the negotiators to avoid the creation of new rights or the alteration of existing rights available to the defense or private parties. Simply stated, this means that a private party wishing to oppose execution of a request must base his opposition on something other than the provisions of the Treaty; if a private party wishes to suppress or exclude evidence obtained under the Treaty, he must base his arguments on something other than the provisions of the treaty.

15. In Re Grand Jury Proceedings (Bank of Nova Scotia), 740 F.2d 817 (11th Cir. 1984); In Re Grand Jury Proceedings (Bank of Nova Scotia), 691 F.2d 1384 (11th Cir. 1983).

16. Such a subpoena might be served for the purpose of putting the one possessing the documents on notice that those documents are needed as evidence and that their destruction could be prosecuted as a crime or as contempt of court. See Rule 17(g), Federal Rules of Criminal Procedure.

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17. For a discussion of offenses "related" to political offenses in the extradition context, see, Eain v. Wilkes, 641 F.2d 504 (7th Cir. 1981).

18. Indeed, it is specifically intended that assistance will be granted for fiscal offenses.

19. For instance, if Canada were to request the United States to make available certain arrival and departure records maintained by the Immigration and Naturalization Service concerning aliens, there would be neither a basis nor a necessity for requesting judicial intervention.

20. Of course, nothing in the Treaty could require a court to execute a request when doing so would be contrary to the Constitution of the United States. See Reid v. Covert, 354 U.S. 1, 77 S.Ct. 1222, 1 L.Ed.2d 1148 (1957)

This provision is also favorable for the United States inasmuch as it gives greater assurance that a Canadian court will not refuse assistance.

21. The provision requires "best efforts" since the Requested State may have an affirmative obligation to disclose the information, regardless of the confidentiality requested by the other State. For example, if the United States were to find that a request from Canada contained information exculpatory to a defendant, the United States would be obliged to disclose it to the defendant. Brady v. Maryland, 373 U.S. 83 (1963); U.S. v. Starusko, 729 F.2d 256 (3d Cir. 1984).

22. The Canadian implementing legislation currently before Parliament provides for the issuance of a search warrant in sections 10 and 12 ("Search and Seizure") and for an order in the nature of a subpoena duces tecum in sections 17 and 18 ("Evidence for use Abroad").

23. The United States Court of Appeals for the Second Circuit has ruled that in order for a court to execute a foreign request for evidence the requirement of 28 U.S.C. 1782 that the evidence be for use before a tribunal in that foreign state is to be applied strictly such that assistance could not be granted on behalf of an administrative agency. Fonseca v. Blumenthal, 620 F.2d 322 (2nd Cir. 1980); In Re Letters Rogatory Issued by the Director of Inspection of the Government of India, 305 F.2d 1016 (2nd Cir. 1967).

24. It is noted that a problem similar to that discussed in note 21, supra, could require that the U.S. to refuse to comply with the limitation on use requested by the Canadian Central Authority. See Brady v. Maryland and U.S. v. Starusko, supra, note 21.

25. During the discussions, it was noted that there are a number of methods by which persons located in the territory of one State may be invited to travel to the other to appear as witnesses or for other purposes. Currently existing working arrangements provide for authorities in each country routinely to assist the other by inviting, on behalf of the other, persons to travel to the other state to appear as a witness. As provided by Article III of the Treaty, those arrangements are to remain in place. Further, there is no prohibition against the authorities of one state contacting potential witnesses by telephone to invite them to appear in court. It was also noted during the discussions that the United States would be able to serve subpoenas under 28 U.S.C.

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1783 on U.S. nationals or residents located in Canada using methods other than those provided by the Treaty.

26. It is noted that Section 43 of the Canada Evidence Act does permit a court to order "production of any writings or other documents. . ." However, as discussed in note 1 and the accompanying text, Section 43 procedures have generally been unavailable prior to indictment of the case.

27. The Canadian implementing legislation provides in Section 18(2) that, in execution of a request under a treaty such as this, a court may order a person to appear and testify and

> (a) . . . order the person so named, where appropriate, to make a copy of a record or to make a record from data and to bring the copy or record with him, and order the person so named to bring with him any record or thing in his possession or control, in order to produce them to the person before whom the examination is made . . . .

28. The U.S. delegation informed the Canadian delegation that it intended to follow its standard practice of noting assertions of foreign privileges and immunities for the record and then compelling the witness to answer. See, e.g., R. & J. Dick Co. v. Bass, 295 F.Supp. 758 (N.D. Ga. 1966), a case involving a federal court in Georgia in a diversity action being requested by a Pennsylvania court to take the deposition of persons located in Georgia who had no privilege under Georgia law to refuse to testify but might have a privilege under Pennsylvania law (where the suit was pending).

The court may protect the witness' rights under foreign law by an appropriate order, if necessary. For instance, in the R. & J. Dick Co. case, supra, the court ordered:

> . . . that the deposition proceed, but solely upon the condition that all copies thereof, when transcribed, be sealed and delivered to the clerk of this court, and that the contents thereof be not divulged or disclosed by either of the parties or their counsel to any other person or persons pending a ruling by the court as to what portions of such deposition, if any, shall be admitted in evidence.

29. Canada will be able to provide tax information to authorities in the U.S. where the law permits Canadian police forces to obtain such information. Where the law prohibits Canadian police forces from obtaining such tax information, this information would be unavailable to the U.S.

30. See, United States v. Miller, 830 F.2d 1073 (9th Cir. 1987).

31. Treaty between the United States and the Kingdom of Thailand on Mutual Assistance in Criminal Matters, signed at Bangkok on March 19, 1986.

32. The form in the appendix, "CERTIFICATE OF AUTHENTICITY OF BUSINESS RECORDS, is based on the form used in United States v. Miller, 830 F.2d 1073 (9th Cir. 1987). The court in Miller found the records so certified

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to have been properly mitted into evidence, pursuant to 18 U.S.C. 3505.

33. See the forms con ined in the Treaty between the United States and the Kingdom of Thailan on Mutual Assistance in Criminal Matters, March 19, 1986; the Treaty b ween the United States and the United Kingdom of Great Britain and Nort rn Ireland Concerning the Cayman Islands on Mutual Assistance in Criminal atters, July 3, 1986; and the Treaty between the United States and the hamas on Mutual Assistance in Criminal Matters, June 12, 1987, and Aug t 18, 1987.

34. An example is aut ntication under the Convention Abolishing the Requirement of Legalis ion for Foreign Public Documents, done at the Hague October 5, 1961, ntered into force for the United States October 15, 1981, T.I.A.S. 100 , 527 UNTS 189. Documents so authenticated would be offered for admissi under Rule 902(3) of the Federal Rules of Evidence.

35. For example, on J uary 23, 1986, federal prisoner Edward Hayes Ward was temporarily relea from the Federal Correctional Institution at Talladega, Florida, to ravel to Nassau, the Bahamas, and testify for the Government at a preli ary inquiry in the case of Commissioner of Police v. George Smith and Ev ter Bannister, Case No. 4948-85. Ward was accompanied by DEA age s, who saw to his security and insured his prompt return to the United S tes when his testimony was no longer needed.

36. See note 5, sup . Article 26 of our treaty with Switzerland, Article 32 of our trea with Turkey, Article 7 of our Dutch treaty, and Article 16 of our Ital n treaty.

37. The reference to riminal process" is intended to reflect that no agreement was reached the negotiators with regard to civil or administrative process However, such process could not be used to delay the person's return to he Requested State.

38. Nothing contain in the Treaty, of course, grants the person in such a case a right no otherwise existing to remain in the territory of the Requesting State.

39. Whether "dual cri nality" (see note 13, above) is a Constitutional requirement for search nd seizure has yet to be decided by our courts.

40. The negotiators reed that the term "proceeds of crime" is intended to include all propert obtained directly or indirectly as a result of the commission of an offen (e.g., art work purchased with drug profits).

41. Pub.L. 99-570, Ti e I, Section 1366(a), October 27, 1986, 100 Stat. 3207.

42. International Coo ration in Civil and Commercial Procedure, Edited by Ludwik Kos-Rabcewic Kubkowski, 397 (1975).

43. Treaty between th United States and Mexico on the Execution of Penal Sentences, November 25 1976, 28 UST 7399, TIAS 8718 (entered into force November 30, 1977).

ENDNOTES

44. This form is intended for use in connection with 18 U.S.C. 3505 records and is based on the certificate used in United States v. Miller, 830 F.2d 1073 (9th Cir. 1987).

45. This form is to be used primarily in connection with Article XIII of this Treaty ("Government Documents and Records").

46. This form is to be used to establish chain of custody of articles seized pursuant to Article XVI.

Senate of the United States

IN EXECUTIVE SESSION

Resolved, (two-thirds of the Senators present concurring therein), That the Senate advise and consent to the ratification of the Treaty between the Government of the United States of America and the Government of Canada on Mutual Legal Assistance in Criminal Matters, with Annex, signed at Quebec City on March 18, 1985.

ADDITIONAL VIEWS OF SENATOR JESSE HELMS

The major issue with respect to the Mutual Legal Assistance Treaty with Canada is the protection of the constitutional rights of United States citizens.

Both the committee report and the administration's witnesses insist that the MLAT's are an effective means of obtaining legal assistance. The effectiveness comes in part from streamlining the process of obtaining justice. That is also the major problem associated with these treaties. The MLAT's change and challenge constitutional processes as they relate to individual rights under the Constitution.

No other country protects the rights and freedoms of U.S. citizens in the way that the U.S. Constitution does. The major protections are found in the Bill of Rights. Despite what the committee would have us believe, these protections deal not with substantive law but rather with process.

NEED FOR CONSTITUTIONAL RESERVATION

It is for this reason that I offered a reservation identical to the Lugar-Helms reservation on the Genocide Convention which was approved by 93 Senators in February, 1986. This reservation reads:

> Nothing in this Treaty requires or authorizes legislation or other action by the United States prohibited by the U.S. Constitution as interpreted by the United States.

This reservation, if accepted, would be included in the instruments of ratification submitted to the other ratifying countries. Thereby, the constitutional rights of Americans would remain secure.

UNANSWERED QUESTION OF CONSTITUTIONAL PRIMACY

The essential reason for such a proviso is the still unanswered question of whether the Constitution supersedes a treaty or whether a treaty can be held to be of equal force to the Constitution with respect to its provisions.

There is a continuing dispute among scholars as to whether the Constitution always prevails within the territorial boundaries of the United States and in foreign lands. In support of her contention that the courts have held the Constitution always to be supreme, the State Department witness could cite for the committee only one case: *Reid* v. *Covert* (1956), a case dealing with an executive agreement—not with a treaty. This important distinction was acknowledged by the State Department witness.

In *Reid,* the distinguished Supreme Court jurist John Marshall Harlan wrote in his concurring opinion that "I cannot agree with the suggestion that every provision of the Constitution must be

deemed automatically applicable to American citizens in every part of the world* * * The proposition is, of course, not that the Constitution 'does not apply' overseas, but that there are provisions in the Constitution which do not necessarily apply in all circumstances in every foreign place."

Although *Reid* v. *Covert* (1957) is the most recent case on the Constitution and its relationship to treaties, there are other cases which have either introduced new law in their time or muddied the waters of what was then current law.

OTHER CASES

Oliver Wendell Holmes, Jr., in his majority opinion in *Missouri* v. *Holland* (1920), literally dispensed with the tenth amendment as it related to treaties. He does, however, pose a question which indicates that the issue of treaties versus the Constitution is not wholly resolved by the statement: "The treaty in question does not contravene any prohibitory words to be found in the Constitution."

Geoffroy v. *Riggs* (1890) stands for the proposition that "The treaty power as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the Government or of its Departments, and those arising from the nature of the Government itself * * *." This is a generalized statement of *dicta* and obscures more than clarifies the relationship of treaties to the Constitution.

In *Hauenstein* v. *Lynham* (1880), the Court lumps the Constitution and treaties together, stating that they both are "part of the law of every state * * *." In other words, both are the law of the land as expressed in Article VI of the U.S. Constitution.

In the landmark case of *Foster* v. *Nielson* (1829), the Supreme Court through the majority opinion of Chief Justice John Marshall held that treaties could be self-executing, though there was no precedent for this in U.S. law. The MLAT's are self-executing treaties, and it is not clear what constitutional restraints may be placed upon them.

In *Ware* v. *Hylton* (1796), Justice Cushing wrote that the treaty in question "is of equal force with the Constitution."

Needless to say, I wish it were the case that the Supreme Court had at some time conclusively determined that the Constitution is supreme in all cases. Since this determination has not been made, a reservation is necessary to assure that the constitutional rights of all Americans are not abridged by the execution of those treaties.

MEANS TO OBTAIN EVIDENCE

During consideration of the Genocide Convention in 1985, the Foreign Relations Committee adopted a reservation aimed at protecting the constitutional rights of Americans. Unless a similar reservation is attached to the treaty, the constitutional rights of Americans will unnecessarily be left at risk.

This treaty seeks to enhance national and international law enforcement interests and aims to overcome the alleged burdens placed upon governments attempting to control interstate criminality.

The treaty seeks to allow U.S. prosecutors to obtain some assistance from foreign countries in obtaining evidence, and other matters, of importance to prosecutions.

But this treaty also seeks to help foreign governments obtain evidence for their prosecutions. Other countries have different systems of law. And the Constitution of no other country protects the rights and freedoms of its citizens as does the U.S. Constitution.

Other countries could demand evidence from the United States that would not be admissible in our own courts under our Constitution. Or they could seek U.S. evidence relating to persons in their own countries just to see how much we know.

So, the question is this: Will this treaty unintentionally result in an infringement upon the constitutional rights and freedoms of American citizens?

As these treaties are currently drafted, we can be certain there will be a full scale assault against American liberties. The group of lawyers most concerned with protecting the rights of U.S. citizens in courts abroad—the International Legal Defense Counsel—strongly opposed enactment of these treaties "as is" in hearing of the Senate Foreign Relations Committee.

The MLAT treaties will also help foreign governments obtain evidence for their prosecutions. But these same governments, some of which are corrupt (e.g. Mexico and the Bahamas), could demand evidence from the United States that would not be admissible in our own courts under the United States Constitution. They also could seek U.S. evidence relating to persons in their own countries just to see how much we know.

ADMINISTRATION FAILURE TO DEVELOP POSITION

The Principal Deputy Legal Adviser, Mary Mochary, in response to a question regarding the administration position on the constitutional issues raised by this treaty, failed to cite any original arguments and limited herself to reading from the majority report of the 100th Congress. Sadly, that report put forward the following specious arguments:

(1) The U.S. Supreme Court regularly and in a number of cases asserted the supremacy of the Constitution over treaties.

(2) None of the MLAT's requires or authorizes legislation which is prohibited by the Constitution.

(3) If we reserve the rights of our Constitution, other governments will reserve the rights of their constitutions which are based on different legal systems.

(4) The MLAT's do not require new grounds for legal process but merely provide mechanisms for the obtaining of evidence.

(5) The defendants under the MLAT's are not excluded from legal assistance—only from the use of the treaties.

None of these assertions is cogent, as may be surmised from the following rebuttal:

(1) The only Supreme Court case on the conflict between international agreements and the Constitution is *Reid* v. *Covert,* and the meaning of that case is ambiguous as to treaties rather than to executive agreements as already explained in more detail above.

(2) The MLAT's do not recognize certain Bill of Rights guarantees such as the right to counsel and the privilege against self-incrimination.

(3) The main purpose of a constitutional reservation is to prevent the imposition of other countries' legal systems into the U.S. Constitution-based American legal system.

(4) The mechanisms provided by the MLAT's should be subject to the protections afforded by the U.S. Bill of Rights.

(5) The U.S. Government insists it needs the MLAT's because the method of letters rogatory is inadequate, but the Government also argues that letters rogatory—which it claims to be too slow and cumbersome—is good enough for defendants and others subject to the MLAT procedures.

For these reasons, I feel that if the MLAT treaties are to be approved, they must be subject to a reservation which would provide basic constitutional guarantees. Otherwise, they could subvert what committee report claims they are trying to protect.

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